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EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

May 8, 2018

In the Matter of
Ali and Elaine Bigdeliazari

OADR Docket No. WET-2016-027
DEP File No. SE-83-2048
West Yarmouth, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In this appeal, Michael Durkin and Janet Durkin (“the Petitioners”) challenge a Superseding Order of Conditions (“SOC”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to Ali and Elaine Bigdeliazari (“the Applicants”) on September 16, 2016, pursuant to the Massachusetts Wetlands Protection Act, G.L. c. 131, § 40 (“MWPA”), and the Wetlands Regulations, 310 CMR 10.00 et seq. (“the Wetlands Regulations”). The SOC affirmed the Town of Yarmouth Conservation Commission’s (“YCC”) approval of the Applicants’ proposed Project at 188 Berry Avenue, West Yarmouth, Massachusetts (“the Property”), specifically “[s]ingle family house additions, swimming pool, pervious driveway, garage, lawn reduction and

replacement with mitigation planting of native salt tolerant species, [and] fencing.” SOC, at p. 1. The Department affirmed the YCC’s approval of the proposed Project after finding that the Project will not adversely affect the stability of the Coastal Bank, a wetlands resource, at the Property.¹ Department’s Pre-Hearing Statement, at pp. 1-2.

The Petitioners contend that the SOC violates the MWPA and the Wetlands Regulations and request that the SOC be vacated and the proposed Project rejected because the Project purportedly does not satisfy the Performance Standards for activities in Coastal Bank as set forth in 310 CMR 10.30(6);² the entire Project area will be located in Land Subject to Coastal Storm Flowage (“LSCSF”) and will not further the MWPA interests of flood control and storm damage prevention;³ and the Project will be detrimental to wildlife habitat. Petitioners’ Appeal Notice, at pp. 3-5; Petitioners’ Pre-Hearing Statement, at pp. 2-4, 7-8.

The Applicants and the Department dispute the Petitioners’ claims and request that the SOC be affirmed, contending that the Department properly issued the SOC pursuant to the MWPA and the Wetlands Regulations. Applicant’s Pre-Hearing Statement, at pp. 1-11; Department’s Pre-Hearing Statement, at pp. 1-2.

I conducted an evidentiary Adjudicatory Hearing (“Hearing”) to resolve the following issues raised by the Petitioners’ appeal of the SOC:

1. Whether the proposed Project meets the Performance Standards for

¹ “Coastal Bank” is “the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland.” 310 CMR 10.32(2).

² “Performance Standards” are “th[e] requirements established by [the Wetlands Regulations] for activities in or affecting [specific wetlands areas protected by MWPA].” 310 CMR 10.04. The Performance Standards appear at 310 CMR 10.25 through 10.35 and 10.37, and 310 CMR 10.54 through 10.60. *Id.*

³ “LSCSF” is “land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.” 310 CMR 10.04. “Under the Wetlands Regulations, LSCSF is ‘likely to be significant to flood control and storm damage prevention.’” *In the Matter of Norman Rankow*, OADR Docket No. WET-2012-029, Recommended Final Decision (August 6, 2013), 2013 MA ENV LEXIS 45, at 17, adopted as Final Decision (August 12, 2013), 2013 MA ENV LEXIS 79.

Coastal Bank as set forth in 310 CMR 10.30(6)?

2. With respect to the proposed Project being located within LSCSF, did the Department properly determine that the Project will not interfere with the MWPA interests of flood control and storm damage prevention?
3. Whether the Department properly considered the impact of the proposed Project on wildlife habitat?⁴

By agreement of the parties, the Hearing was transcribed by a Registered Professional Reporter retained by the private parties in the case at their expense.⁵ At the Hearing, the parties were represented by legal counsel and presented witnesses and documentary evidence in support of their respective positions on the issues for resolution in the appeal as set forth above. A total of seven witnesses, all of whom had previously submitted Pre-Filed Testimony (“PFT”) on behalf of the parties for the Hearing, were made available for cross-examination under oath at the Hearing. The parties’ respective witnesses at the Hearing were as follows.

The Petitioners’ witnesses were:

- (1) C. Diane Boretos (“Ms. Boretos”), a Professional Wetlands Scientist with more than 30 years of experience in the wetlands field; and
- (2) Paul A. Brogna (“Mr. Brogna”), a Professional Engineer with more than 40 years of civil engineering experience.⁶

The Applicants’ witnesses were:

- (1) John Z. Demarest, Jr. (“Mr. Demarest”), a Professional Land Surveyor

⁴ These issues for resolution were established at Pre-Screening (“Pre-Hearing”) Conference that I conducted with the parties in November 2016. See November 28, 2016 Pre-Screening Conference Report and Order (“Conf. Report & Order”), at pp. 3-4.

⁵ My references to the Hearing Transcript in this Recommended Final Decision are noted as “HT, Page:Line” e.g., HT, 50:12.

⁶ The Petitioners’ third witness, Gordon Peabody (“Mr. Peabody”), the Director of Safe Harbor Environmental, a habitat restoration consultancy, filed PFT for the Petitioners but failed to appear for cross-examination at the Hearing as required by the Adjudicatory Proceeding Rules, and, as a result, his PFT was stricken from the record at the request of the Applicants. HT, 11:14-23; See also Conf. Report & Order, at p. 8 (Adjudicatory Rules mandate that “[i]f a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded unless the parties agree otherwise.” 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)3.)

with more than 35 years of land surveying experience on Cape Cod;

- (2) Lynne Hamlyn (“Ms. Hamlyn”), a Professional Wetlands Scientist with more than 30 years of experience in the wetlands field;
- (3) James O’Connell (“Mr. O’Connell”), a Coastal Geologist for more than 30 years; and
- (4) Sean Riley (“Mr. Riley”), a Professional Engineer and Certified Floodplain Manager with over 21 years of civil engineering experience.

The Department’s witness was Gregory DeCesare (“Mr. DeCesare”), a senior Environmental Analyst in the Wetlands and Waterways Program of the Department’s Southeast Regional Office with nearly 30 years of experience in the environmental field.

As discussed in detail below, based upon the testimonial and documentary evidence that the Parties presented at the Hearing⁷ and the applicable law, I recommend that the Department’s Commissioner issue a Final Decision affirming the Department’s SOC affirming the YCC’s approval of the proposed Project for the following reasons.

First, by failing to present any probative testimony addressing the Performance Standards for Coastal Bank, the Petitioners waived this issue at the Hearing. Additionally, I find that the proposed Project meets the Performance Standards for Coastal Bank as set forth in 310 CMR 10.30(6), for the reasons set forth in the unrefuted testimony of the Applicants’ and the Department’s respective witnesses on this issue. Based on the same unrefuted testimony, I also find that the Coastal Bank was properly delineated for the proposed Project.

Second, with respect to the proposed Project being located within LSCSF, I find that the

⁷ With respect to my review of the documentary evidence submitted by the Parties in this appeal, I re-state my denial of the Applicants’ February 3, 2017 Motion to Strike Exhibit 12 of Petitioners’ Appendix on relevancy, hearsay, and authentication grounds. As I noted in my Pre-Screening Report, at pp. 5-6, under G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h), while “agencies need not observe the rules of evidence [required] by courts... [t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer....” I also note that the Applicants’ Motion to Strike was raised at the February 28, 2017 Hearing, and I denied the Motion at that time. HT, 17:9-22.

Department properly determined that the Project will not interfere with the MWPA interests of flood control and storm damage prevention.

Lastly, I also find that the Department properly determined that the Project will not have a detrimental impact on wildlife habitat.

BACKGROUND

To more fully explain the basis for my findings in this Recommended Final Decision, it is useful to provide an in-depth description of the Property at issue, with particular emphasis upon its MWPA resources and the Applicants' proposed Project activities, based upon my review of undisputed facts as set forth in the evidentiary record.

The Applicants' Property is shown on the Site Plan entitled "Plan of Land in West Yarmouth, MA 188 Berry Avenue, Prepared for Ali & Elaine Bigdeliazari, Scale: 1" = 30'," dated December 21, 2015. Applicants' Appendix, Ex. A, Property Site Plan; Ms. Hamlyn's PFT, ¶ 7.⁸ As shown on the Site Plan, the entire Property is within LSCSF. Ms. Hamlyn's PFT, ¶ 9. The LSCSF on the Property is comprised of two 100 Year Flood Zones, as mapped by the Federal Emergency Management Agency ("FEMA")⁹ and depicted on the Site Plan: an AE Zone (el. 11') and a VE Zone (el. 13'). Applicants' App. Ex. A; Ms. Hamlyn's PFT, ¶ 8; Mr.

⁸ At the Hearing, all of the Parties utilized this Site Plan, which depicts the Property, the proposed Project, and the MWPA resources, as a basis for their respective positions. In addition, I note that the Petitioners, who had the burden of proof at the Hearing (See discussion at pp. 15-17 below), did not present an alternative plan depicting the MWPA resources on the Property, but rather included the Site Plan as an Exhibit in this proceeding. See Petitioners' Exhibits, #14 (December 21, 2015 Plan of Land).

⁹ FEMA is responsible for furthering the U.S.'s ability to "sustain and improve [the nation's] capability to prepare for, protect against, respond to, recover from[,] and mitigate all hazards." <https://www.fema.gov/about-agency>. "The FEMA Flood Map Service Center (MSC) is the official public source for flood hazard information produced in support of the National Flood Insurance Program (NFIP)." <https://msc.fema.gov/portal>. FEMA Flood Zone Designations "are geographic areas that FEMA has defined according to varying levels of flood risk. These zones are depicted on a community's Flood Insurance Rate Map (FIRM) or Flood Hazard Boundary Map. Each zone reflects the severity or type of flooding in the area." <https://snmapmod.snco.us/fmm/document/fema-flood-zone-definitions.pdf>. "Coastal areas with a 1% or greater chance of flooding and an additional hazard associated with storm waves" are designated by FEMA as "VE." *Id.* "These areas have a 26% chance of flooding over the life of a 30-year mortgage" on real property located in such areas. *Id.*

O'Connell's PFT, ¶ 42. An AE Zone is designated by FEMA as an area subject to the 1% annual chance flood with the Base Flood Elevation ("BFE") printed on the Flood Insurance Rate Map. Mr. O'Connell's PFT, ¶ 43. AE Zones are generally areas of stillwater flooding,¹⁰ where wave action would be minimal. Id.; Mr. DeCesare's PFT, ¶ 28. However, some AE Zones immediately landward of Velocity Zones can have narrow Areas of Moderate Wave Action, defined as having wave heights between 1.5 feet and 3 feet, and/or can have Areas of Minimal Wave Action, defined as having wave heights of less than 1.5 feet. Mr. O'Connell's PFT, ¶ 43. As these AE Zones move further landward, the lower wave heights diminish into areas of stillwater flooding. Id. In contrast to AE Zones, a VE Zone is designated by FEMA as an area subject to the 1% annual chance flood, with wave effects of 3 feet or greater. Mr. O'Connell's PFT, ¶ 45.

On the Property, the VE Zone is located seaward of the top of the Coastal Bank, and this VE Zone is not in the area of the proposed Project. Applicants' App. Ex. A; Mr. O'Connell's PFT, ¶ 46;¹¹ See also, Mr. DeCesare's PFT, ¶ 28 ("[T]he applicant's proposed construction project is landward of the high energy Velocity Zone and only within an AE Zone"). The remainder of the Property, including the Project area, is within the AE Zone. Applicants'

¹⁰ "Stillwater" is defined by FEMA as "the flood level not including the effects of waves . . . or tsunamis, but including storm surge and astronomic tide." Stillwater: FEMA Coastal Flood Hazard Analysis and Mapping Guidelines Focused Study Report, February 2005, at p. 1 (can be accessed at https://www.fema.gov/media-library-data/20130726-1541-20490-3376/fm_p1still.pdf).

¹¹ Although the Petitioners' witness, Mr. Brogna, testified at the Hearing that "[b]ased on the FEMA maps, the December 21, 2015 Plan of Land, and [his] own investigation, the Velocity Zone, VE (EL 13) is far above the top of the actual coastal bank," Mr. Brogna's PFT, ¶ 11, he offered no expert analysis or alternative plan depiction specifying where, how, or to what extent the VE is "far above" the top of the actual Coastal Bank. Due to the Petitioners' lack of evidentiary support regarding the location of the VE, I find that the Site Plan depiction of the AE and VE zones on the Property to be un-refuted by the Petitioners. See also, discussion of LSCSF issue below at pp. 19-25.

App. Ex. A; Mr. O'Connell's PFT, ¶ 47.

In addition, there are two Coastal Banks on the Property and depicted on the Site Plan which meet the criteria "top of [C]oastal [B]ank," as defined by DEP Wetlands Program Policy 92-1 ("DEP Policy 92-1" attached as Exhibit D to Applicants' Appendix). Applicants' App. Ex. A; Mr. DeCesare's PFT, ¶ 19; Ms. Hamlyn's PFT, ¶ 18; Mr. Riley's PFT, ¶ 14. In accordance with DEP Policy 92-1: "There can be multiple [C]oastal [B]anks within the same site. This can occur where the [C]oastal [B]anks are separated by [LSCSF] (an area less than 10:1)." DEP Policy 92-1 at Applicants' App. Ex. D; Mr. Riley's PFT, ¶ 14. The first, more seaward top of Coastal Bank on the Property is located at the top of the stone revetment, with a flattened shelf — less than 10:1 — immediately upgradient of it that is LSCSF. Ms. Hamlyn's PFT, ¶ 18; Mr. O'Connell's PFT, ¶ 23; Mr. Riley's PFT, ¶ 15; Mr. DeCesare's PFT, ¶ 19. The second, more landward Coastal Bank begins where the slope again rises to a steepness greater than 10% and ends where that slope flattens to less than 10% inland. *Id.* This more landward top of Coastal Bank is delineated on the Site Plan and located approximately parallel to an existing brick patio along the waterfront side of the Property's existing dwelling. Applicants' App., Ex. A; Ms. Hamlyn's PFT, ¶ 10.

The Applicants' proposed Project is shown on the Site Plan and includes: (1) a 528 square foot addition extending from the East side of the existing dwelling; (2) a proposed dry laid patio extending off the new addition to the South; (3) the removal of a 219 square foot section of the existing dwelling; (4) a proposed 20 foot x 24 foot pool, with attendant 6 foot stamped concrete apron on the Northeast side of the dwelling; (5) a proposed dry laid patio connecting the new addition and pool area; (6) a 24 foot x 38 foot proposed garage, with living area on the second floor; and (7) a 190 square foot addition to include a covered porch,

connecting the existing dwelling with the proposed garage. Applicants' App., Ex. A; Ms. Hamlyn's PFT, ¶¶ 7, 11.

The proposed Project will result in a net increase of 1,692 square feet of hardscape within the 50 foot buffer to the top of Coastal Bank. Applicants' App., Ex. A; Ms. Hamlyn's PFT, ¶ 12. As mitigation for this net increase, the Applicants propose to eliminate 1,692 square feet of existing managed lawn located seaward of the dwelling and will naturalize the area with New England Coastal Salt Tolerant Grass Mix, by New England Wetland Plants, Inc., or equivalent plantings. Ms. Hamlyn's PFT, ¶ 13. A single rail fence will be installed at the upper edge of this planted area to ensure that the enhanced native buffer remains undisturbed on a perpetual basis, and the Applicants will monitor the new plantings for a period of three (3) years to ensure survivability. Id.

STATUTORY AND REGULATORY FRAMEWORK

I. THE PERMITTING REQUIREMENTS OF THE MWPA AND THE WETLANDS REGULATIONS

The purpose of the MWPA and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following eight statutory interests:

- (1) protection of public and private water supply;
- (2) protection of ground water supply;
- (3) flood control;
- (4) storm damage prevention;
- (5) prevention of pollution;
- (6) protection of land containing shellfish;
- (7) protection of fisheries; and

(8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2); In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 6-7, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77; In the Matter of Webster Ventures, LLC, OADR Docket No. WET-2014-016 (“Webster Ventures I”), Recommended Final Decision (February 27, 2015), 2015 MA ENV LEXIS 14, at 10-11, adopted as Final Decision (March 26, 2015), 2015 MA ENV LEXIS 10; In the Matter of Elite Home Builders, LLC, OADR Docket No. WET-2015-010, Recommended Final Decision (November 25, 2015), adopted as Final Decision (December 17, 2015), 22 DEPR 202, 204 (2015); In the Matter of Sunset City, Inc., OADR Docket No. WET-2016-016, Recommended Final Decision (March 31, 2017), 2017 MA ENV LEXIS 35, at 9-10, adopted as Final Decision (April 21, 2017, 2017 MA ENV LEXIS 33.

The MWPA and the Wetlands Regulations provide that “[n]o person shall remove, fill, dredge[,] or alter¹² any [wetlands] area subject to protection under [the MWPA and Wetlands

¹² The Wetlands Regulations at 310 CMR 10.04 define “alter” as “chang[ing] the condition” of any wetlands area subject to protection under the MWPA and the Wetlands Regulations. Examples of alterations include, but are not limited to, the following:

- (a) the changing of pre-existing drainage characteristics, flushing characteristics, salinity distribution, sedimentation patterns, flow patterns and flood retention areas;
- (b) the lowering of the water level or water table;
- (c) the destruction of vegetation;
- (d) the changing of water temperature, biochemical oxygen demand (BOD), and other physical, biological or chemical characteristics of the receiving water.

310 CMR 10.04. “Dredge” is defined as “deepen[ing], widen[ing], or excavat[ing], either temporarily or permanently” a protected wetlands area, and “[f]ill means to deposit any material [in a protected wetlands area] so as to raise an elevation, either temporarily or permanently.” Id.

Regulations] without the required authorization, or cause, suffer or allow such activity” G.L. c. 131 § 40, ¶ 32; 310 CMR 10.02(2)(a); Vecchione, 2014 MA ENV LEXIS 76, at 7; Webster Ventures I, 2015 MA ENV LEXIS 14, at 11-12; Elite Home Builders, 22 DEPR at 204; Sunset City, 2017 MA ENV LEXIS 35, at 10. “Any activity proposed or undertaken within [a protected wetlands] area[,] . . . which will remove, dredge or alter that area, is subject to Regulation under [the MWPA and the Wetlands Regulations] and requires the filing of a Notice of Intent (“NOI”)” with the permit issuing authority. 310 CMR 10.02(2)(a). A party must also file an NOI for “[a]ny activity . . . proposed or undertaken within 100 feet of [any protected wetlands]” described as “the Buffer Zone” by the Regulations, “which, in the judgment of the [permit] issuing authority, will alter [any protected wetlands].” 310 CMR 10.02(2)(b).

The “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer v. Department of Environmental Protection, 73 Mass. App. Ct. 714, 717-19 (2009). Under the MWPA, a local Conservation Commission may issue an Order of Conditions authorizing or precluding proposed activities in protected wetlands areas and “[is] allowed to ‘impose such conditions as will contribute to the protection of the interests described [in MWPA and the Wetlands Regulations]’” and to require that “‘all work shall be done in accordance’ with the conditions they might impose. . . .” Id.

Orders of Condition, including any findings and wetlands delineations forming the basis of the Orders, are valid for three years from the date of the Orders’ issuance. 310 CMR 10.05(6)(d). However, any “order [by the Department] shall supersede the prior order of the

conservation commission [issued pursuant to the MWPA and the Wetlands Regulations] . . . and all work shall be done in accordance with the [Department's] order," *Id.*, unless the Commission has properly denied the proposed project pursuant to a local Wetlands Protection Bylaw that is more protective than the MWPA. Oyster Creek Preservation, Inc. v. Conservation Commission of Harwich, 449 Mass. 859, 866 (2007). This is the case because the MWPA "establishes Statewide minimum wetlands protection standards, [but] local communities are free to impose more stringent requirements" by enacting local Wetlands Protection Bylaws. Oyster Creek, 449 Mass. at 866; Healer, 73 Mass. App. At 716. As a result, an SOC issued by the Department under the MWPA approving proposed work in protected wetlands areas cannot preempt a timely decision of a local Conservation Commission denying approval of the proposed work based "on provisions of a local bylaw that are more protective than the [MWPA]." Oyster Creek, 449 Mass. at 866. This issue is not present in this case, because both the YCC and the Department approved the proposed Project pursuant to the MWPA and the Wetlands Regulations.

II. THE PROTECTED WETLAND AREAS OF COASTAL BANK, LSCSF, AND THE WETLANDS INTEREST OF WILDLIFE HABITAT

A. Coastal Bank

The Wetlands Regulations at 310 CMR 10.30(2) define Coastal Bank as:

the seaward face or side of any elevated landform, other than a coastal dune, which lies at the landward edge of a coastal beach, land subject to tidal action, or other wetland.

"When a proposed project involves dredging, removing, filling, or altering a coastal bank, the [permit] issuing authority shall presume that the area is significant to storm damage prevention and flood control." 310 CMR 10.30(1). "This presumption may be overcome only upon a clear showing that a coastal bank does not play a role in storm damage prevention or

flood control, and if the issuing authority makes a written determination to such effect.” Id.

The Performance Standards under the Wetlands Regulations for Coastal Bank govern proposed activities within 100 feet landward of a Coastal Bank determined to be significant to storm damage prevention or flood control. 310 CMR 10.30(3)-10(8). Different Performance Standards apply depending on whether the Coastal Bank supplies sediment to Coastal Beaches, Coastal Dunes, or Barrier Beaches (310 CMR 10.30(3)-10(5)), or acts as a vertical buffer to storm waters (310 CMR 10.30(6)-10(8)). In this case, since the Coastal Bank serves as a vertical buffer to storm waters, the relevant Performance Standard is found at 310 CMR 10.30(6), which requires that any project within 100 feet landward of the top of the Coastal Bank shall have no adverse effects on the stability of the Coastal Bank. See Mr. DeCesare’s PFT, ¶ 20.

B. LSCSF

“LSCSF” is “land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater.” 310 CMR 10.04. “Under the Wetlands Regulations, LSCSF is ‘likely to be significant to [the MWPA interests of] flood control and storm damage prevention.’” Rankow, 2013 MA ENV LEXIS 45. “Although there are no Performance Standards in the Wetlands Regulations for LSCSF, the [wetlands] permit issuing authority may only authorize activities in LSCSF if the issuing authority determines that the proposed activities will not interfere with the MWPA interests of flood control and storm damage prevention.” Id.

C. The MWPA Interest of Wildlife Habitat

The MWPA defines “wildlife habitat” as “those areas subject to [the MWPA] which, due to their plant community composition and structure, hydrologic regime or other characteristics,

provide important food, shelter, migratory or overwintering areas, or breeding areas for wildlife.”

310 CMR 10.04 (definition of “wildlife habitat”)

III. THE PERMIT REVIEW PROCESS UNDER THE MWPA AND THE WETLANDS REGULATIONS

As discussed above, under the wetlands statutory and regulatory scheme, the “[permit] issuing authority” is either the local Conservation Commission when initially reviewing the applicant’s proposed work in a wetlands resource area protected by the MWPA and the Wetlands Regulations, or the Department when it assumes primary review of the proposed work or review on appeal from a local Conservation Commission decision. Healer, 73 Mass. App. Ct. at 717-19. An appeal to the Department of a local Conservation Commission’s Order of Conditions (“OOC”) approving or denying a project is made through an SOC request to the Department. 310 CMR 10.05(7)(a)-(7)(d). The SOC request must be made to the Department “in writing and [must] be sent [to the Department] by certified mail or hand delivered within ten [business] days of [the OOC’s] issuance” 310 CMR 10.05(7)(c). The SOC request must “state clearly and concisely the objections to the [OOC], . . . [and] how the [OOC] is inconsistent with [the Wetlands Regulations] and does not contribute to the protection of the interests identified in [the MWPA].” Id.

It is well settled that, in the normal instance, when the Department receives an SOC request, “[t]he Department [conducts] a de novo review of [the proposed] Project [at issue],” meaning that the review of the Project starts anew, and that the Department makes a determination independent of any local Conservation Commission determination regarding whether the Project should be authorized pursuant to the MWPA and the Wetlands Regulations. In the Matters of Richard Cuda and Town of Orleans Board of Selectmen, OADR Docket Nos. WET-2015-012 and WET-2016-014 (“Cuda”), Recommended Final Decision (December 13,

2017), at p. 40, adopted as Final Decision (January 8, 2018), citing, In the Matter of Chappaquonsett Realty Trust, OADR Docket No. 1988-222, Order of Dismissal and Grant of Motion to Intervene (July 19, 1989), 7 MELR 1421, 1426 (1989). Indeed, in issuing the SOC affirming a local conservation commission's approval of a proposed Project, the Department is not required by either the MWPA or the Wetlands Regulations "[to] adopt conditions identical to those adopted by [the] conservation commission." Id.

Likewise, contrary to the Petitioners' assertions in this case,¹³ an appeal of the Department's SOC to OADR is also a de novo proceeding, where the Presiding Officer conducts an evidentiary hearing that includes the presentation of both sworn testimony and documentary evidence to address the issues that were previously identified for adjudication in the Presiding Officer's Pre-Screening Conference Report and Order. 310 CMR 10.05(7)(j)3-9. Consistent with the powers enumerated in 310 CMR 1.01(5)(a), Presiding Officers are authorized to conduct trial-like evidentiary Adjudicatory Hearings which include, among other things, the right to administer oaths to witnesses, the imposition of limitations upon and the management of the evidence and the participation of the parties in order to develop an adequate and comprehensive adjudicatory record, the right to conduct views of the project site, and the right to issue subpoenas as appropriate. Id. Although the rules of evidence (other than privilege) applicable to court proceedings do not apply to evidentiary Adjudicatory Hearings (See 310 CMR

¹³ See Petitioners' Closing Brief, at pp. 1-2, where the Petitioners erroneously argue that OADR review in this proceeding is limited to the "administrative record" as previously developed by the Department, through its SOC, and the YCC through its OOC. Additionally, as recently discussed in Cuda, "[i]t is important to recognize that the Department's de novo review authority carries over to an administrative appeal of an SOC filed with OADR." Cuda, at pp. 40-41. "During the pendency of the administrative appeal before OADR, the Department 'is [not] precluded from changing its position [on the SOC because] . . . its [primary] obligation [is] to defend the interests of the [MWPA].'" Cuda, at p. 41, citing, In the Matter of John Soursourian, OADR Docket No. WET-2013-028, Recommended Final Decision (2014), 2014 MA ENV LEXIS 49, at 34-36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (2014). "Hence, if during the pendency of an administrative appeal, '[the Department] becomes convinced' based on a different legal interpretation of applicable regulatory standards, new evidence, or error in its prior determination, 'that the interests of [MWPA] require it to take a different position from one that it had adopted previously [in issuing the SOC],' the Department is authorized to, and should change its position." Id.

1.01(13)(h)), at the conclusion of the Hearing, Presiding Officers make findings of fact and rulings of law on every issue identified for adjudication based upon the parties' testimonial and documentary evidence, and then issue a Recommended Final Decision based upon a preponderance of the evidence for consideration by the Department's Commissioner, who is the Final Decision-Maker in the appeal. Id.; 310 CMR 1.01(14)(a); Soursourian, 2014 MA ENV LEXIS 49, at 36 ("The Presiding Officer [responsible for adjudicating the administrative appeal] is not bound by MassDEP's prior orders or statements [in the case], and instead is responsible . . . for independently adjudicating [the] appeal[] and [issuing a Recommended Final Decision] to MassDEP's Commissioner that is consistent with and in the best interest of the [MWPA, the Wetlands] Regulations, and MassDEP's policies and practices").

IV. THE PETITIONERS' BURDEN OF PROOF

As explained in detail at pp. 4-6 of my November 28, 2016 Pre-Screening Conference Report and Order ("Conf. Report"), the Petitioners had the burden of proving by a preponderance of the evidence at the Hearing that the Department erred in issuing the SOC. See 310 CMR 10.03(2); 310 CMR 10.05(7)(j)2.b.iv; 310 CMR 10.05(7)(j)2.b.v; 310 CMR 10.05(7)(j)3.a; 310 CMR 10.05(7)(j)3.b. The Petitioners were required to "produce [at the Hearing] at least some credible evidence from a competent source in support of [their] position" that the Department erred in issuing the SOC. Id. This "credible evidence [was required to come] from a competent source in support of each claim of factual error [made against the Department], including any relevant expert report(s), plan(s), or photograph(s)." 310 CMR 10.05(7)(j)3.c. "A 'competent source' is a witness who has sufficient expertise to render testimony on the technical issues on appeal." In the Matter of City of Pittsfield Airport Commission, OADR Docket No. 2010-041, Recommended Final Decision (August 11, 2010), 2010 MA ENV LEXIS 89, at 36-37, adopted

as Final Decision (August 19, 2010), 2010 MA ENV LEXIS 31. Whether the witness has such expertise depends “[on] whether the witness has sufficient education, training, experience and familiarity with the subject matter of the testimony.” Commonwealth v. Cheromcka, 66 Mass. App. Ct. 771, 786 (2006) (internal quotations omitted); see e.g. In the Matter of Carulli, Docket No. 2005-214, Recommended Final Decision (August 10, 2006)(dismissing claims regarding flood control, wetlands replication, and vernal pools for failure to provide supporting evidence from competent source), adopted as Final Decision (October 25, 2006); In the Matter of Indian Summer Trust, Docket No. 2001-142, Recommended Final Decision (May 4, 2004) (insufficient evidence from competent source showing that interests under MWPA were not protected), adopted as Final Decision (June 23, 2004); In the Matter of Robert Siegrist, Docket No. 2002-132, Recommended Final Decision (April 30, 2003) (insufficient evidence from competent source to show wetlands delineation was incorrect and work was not properly conditioned), adopted as Final Decision (May 9, 2003); Pittsfield Airport Commission, *supra*, 2010 MA ENV LEXIS 89, at 36-39 (petitioner’s failure to submit expert testimony in appeal challenging Department’s Commissioner’s issuance of 401 Water Quality Certification Variance to Pittsfield Airport Commission fatal to petitioner’s claims in appeal because Variance was “detailed and technical . . . requiring expert testimony on issues . . . implicated by the Variance,” including . . . (1) wetland replication, restoration, and enhancement, (2) mitigation of environmental impacts to streams, and (3) stormwater discharge and treatment[,] [and (4)] . . . runway safety and design”).

As for the relevancy, admissibility, and weight of evidence that the Parties introduced in the Hearing, this is governed by G.L. c. 30A, § 11(2) and 310 CMR 1.01(13)(h)(1). Under G.L. c. 30A, § 11(2):

[u]nless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized

by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

Under 310 CMR 1.01(13)(h), “[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . .”

FINDINGS

I. THE PROPOSED PROJECT MEETS THE PERFORMANCE STANDARDS FOR COASTAL BANK AS SET FORTH IN 310 CMR 10.30(6).

As noted above at pp. 11-12, the Performance Standard for Coastal Bank that is applicable to the proposed Project is set forth at 310 CMR 10.30(6), which requires that “[a]ny project on . . . a coastal bank or within 100 feet landward of the top of [a] coastal bank shall have no adverse effect on the stability of the coastal bank.” As an issue identified for adjudication in this proceeding, See Conf. Rept. & Order, at p. 4, the Petitioners had the burden of proving, through the presentation of credible evidence by a competent source, as to why the proposed Project failed to meet this Coastal Bank Performance Standard. The Petitioners, however, failed to present any probative testimonial or documentary evidence addressing this Coastal Bank Performance Standard. As a result, I find pursuant to 310 CMR 10.05(7)(j)3b that the Petitioners waived the issue of whether the proposed Project meets the Performance Standards for Coastal Bank as set forth in 310 CMR 10.30(6). I also find that the proposed Project complies with the Performance Standards for Coastal Bank based upon the unrefuted testimony of Applicant’s and the Department’s respective witnesses. Ms. Hamlyn’s PFT, ¶¶ 24-41 (at pp. 7-9);¹⁴ Mr.

¹⁴ In Ms. Hamlyn’s PFT, ¶¶ 24, 25, and 26 are numbered twice; the first set of paragraphs numbered 24, 25, and 26 are set forth on p. 6 of Ms. Hamlyn’s PFT and the second set of paragraphs numbered 24, 25, and 26 are set forth on p. 7 of Ms. Hamlyn’s PFT.

DeCesare's PFT, ¶¶ 15-26.

In addition, despite the Petitioners' effort to "re-characterize" the Coastal Bank issue into a challenge as to whether the initial delineation of the Coastal Bank was in accordance with DEP Policy 92-1 (See Petitioners' January 3, 2017 Memorandum of Law, pp. 2-3; Mr. Brogna's PFT, ¶ 9), I reject Petitioners' position for following reasons.

First, as the Applicants' witness, Ms. Hamlyn correctly pointed out,¹⁵ the Petitioners' witness, Mr. Brogna, did not support his conclusions challenging the Coastal Bank delineation for the proposed Project with backup documentation regarding the location of the Coastal Bank on the Property other than to state in a conclusory fashion that his opinion is "[b]ased upon [his] on-site measurements and findings . . . and [his] subsequent calculations, and following DEP Policy 92-1. . . ." Mr. Brogna's PFT, ¶ 9. It also appears that Mr. Brogna's opinion for the Coastal Bank location is based, at least in part, upon prior findings contained in a 1994 SOC for the Property, which expired, because SOC's (just as OOC's) are only valid for three years from the date of issuance. Mr. Brogna's PFT, ¶ 9; See also Petitioners' January 3, 2017 Memorandum, at p. 3 (asserting that the Applicants had the burden to explain why the prior Coastal Bank location in the 1994 SOC was not the accurate location); Cf. 310 CMR 10.05(6)(d) (Orders of Conditions are valid for three years from date of issuance).

In contrast to Mr. Brogna's summary opinions on this issue, the Applicants' witness, Ms. Hamlyn, presented extensive testimony both describing the requirements of DEP Policy 92-1 for delineating Coastal Banks, and then detailed how she complied with this Policy through her site investigative work to locate and delineate the Coastal Banks on the Property with the assistance of the Project's Land Surveyor, Mr. Demerest. Ms. Hamlyn's PFT, ¶¶ 14-22, 26 (at p. 6); See

¹⁵ See Ms. Hamlyn PFT, ¶¶ 24-25 (at p. 6) ("Mr. Brogna does not indicate how he arrived at [his] conclusion, nor does he provide any of the data upon which he bases his opinion.... Without that data, or further explanation related to his methodology, it is not possible to address the methodology he used in forming that opinion.")

also, Mr. O'Connell PFT, ¶¶ 15-25 (refuting Mr. Brogna's conclusory statements and concurring with Ms. Hamlyn's methodology and conclusions as consistent with DEP Policy 92-1 requirements). The Department's witness, Mr. DeCesare, also testified that the Coastal Banks on the Property were delineated in accordance with DEP Policy 92-1. Mr. DeCesare's PFT, ¶ 19.

In sum, I find, based upon the evidentiary record, that: (1) the Petitioners waived the issue of whether the proposed Project complies with the Performance Standards for Coastal Bank as set forth in 310 CMR 10.30(6) by failing to present any probative evidence on the issue; (2) the Coastal Banks on the Property were properly delineated by the Applicants in accordance with DEP Policy 92-1; and (3) the proposed Project complies with the Performance Standards for Coastal Bank as set forth in 310 CMR 10.30(6) based upon the unrefuted testimony of the Applicants and the Department's respective witnesses.

II. WITH RESPECT TO THE PROPOSED PROJECT BEING LOCATED WITHIN LSCSF, THE DEPARTMENT PROPERLY DETERMINED THAT THE PROJECT WILL NOT INTERFERE WITH THE MWPA INTERESTS OF FLOOD CONTROL AND STORM DAMAGE PREVENTION.

As noted previously, LSCSF is defined at 310 CMR 10.04 as "land subject to any inundation caused by coastal storms up to and including that caused by the 100-year storm, surge of record or storm of record, whichever is greater," and is presumed to be significant to the MWPA interests of flood control and storm damage prevention. At the Hearing, it was undisputed that the proposed Project would be located within LSCSF but the Petitioners failed to demonstrate through their witnesses, that the Project will negatively impact LSCSF and interfere with the MWPA interests of flood control and storm damage prevention. For the reasons detailed below, I find that: (1) the Petitioners' witness, Mr. Brogna, failed to present any probative testimony on the LSCSF issue; and (2) in contrast, both the Applicants' and the Department's respective witnesses amply demonstrated, through both testimony and exhibits,

that the Department properly determined that the proposed Project's location in LSCSF will not negatively impact the MWPA interests of flood control and storm damage prevention.

With respect to my review of Mr. Brogna's PFT,¹⁶ I note that Mr. Brogna appeared to address the LSCSF issue in ¶¶ 11 and 13 of his PFT. In ¶ 11, Mr. Brogna initially stated that "[b]ased upon the FEMA maps, the December 21, 2015 Plan of Land, and [his] own investigation, the Velocity Zone, VE (EL 13) is far above the top of the actual coastal bank." Despite the importance of the location of the Velocity Zone to potential flooding and/or storm damage, Mr. Brogna did not provide any detail regarding how his "own investigation" led him to conclude that the "VE is far above the top of the . . . coastal bank," which was a crucial foundation for his expert opinion regarding how the proposed Project purportedly impacts the pertinent LSCSF interests. Notwithstanding this lack of supporting technical analysis, Mr. Brogna then asserted, in general terms, that due to the Velocity Zone, "wind and wave action are expected to push water up onto, and across, the locus property, across the areas of proposed work, and onto the [Petitioners'] property, in a significant and/or 100 year storm." Further in this same paragraph, Mr. Brogna opined that "[t]he extensive proposed work . . . will, more likely than not, to a reasonable degree of engineering certainty, direct and channel more flood water onto the [Petitioners'] property," without ever defining how he reached this "reasonable degree of engineering certainty." Mr. Brogna's general pronouncements of anticipated flooding of the Petitioners' property as a result of the proposed Project appeared throughout ¶ 11, without any supporting technical data or analysis (e.g., he stated that "[his] evaluation is that the extensive proposed work will, more likely than not . . . increase the volume and depth of the

¹⁶ As noted previously at p. 3, n.6 above, the testimony of Petitioners' other expert, Mr. Peabody, was stricken from the record due to the fact that he did not appear at the Hearing for cross-examination. Accordingly, despite the fact that the Petitioners asserted at the Hearing that they met their burden of proof on the LCSCF issue "by the Affidavits of Paul Brogna and Gordon Peabody," See Petitioners' January 3, 2017 Memorandum at p. 4, I have not reviewed nor accorded any weight to Mr. Peabody's PFT.

water being channeled . . . onto the [Petitioners'] property" and that "[i]t is more probable than not that the proposed work will cause an additional 6" or greater depth of water onto the [Petitioners'] property, for a number of hours, during a significant . . . storm").

In ¶ 13 of his PFT, Mr. Brogna stated that there was no information before the YCC and the Department about the FEMA Base Flood Elevation ("BFE") that he claimed was necessary to the determination of whether the proposed Project meets the requirements of the State Building Code and certain FEMA regulations (pertaining to a FEMA designated Regulatory Floodway or a designated hydraulically restricted area). See Mr. O'Connell's PFT, at ¶¶ 61, 63). However, the BFE is clearly depicted on the Site Plan. See Applicants' Appendix, Ex. A; Mr. O'Connell's PFT, ¶ 60. More importantly, and for the reasons asserted by the Applicants in their Closing Brief, at pp. 12-13, these issues as described in Mr. Brogna's testimony are completely irrelevant to resolution of the issue of whether the Proposed Project's location in LSCSF will have an impact upon the MWPA interests of flood control and storm damage prevention. For the same reason, Mr. Brogna's testimony in ¶ 13 regarding the costs of the Proposed Project (purportedly in relation to the State Building Code and certain FEMA requirements) is also irrelevant.¹⁷

As noted above, pursuant to 310 CMR 1.01(13)(h), "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. . . ." Due to the failure of Petitioners' witness, Mr. Brogna, to provide any technical data or analysis to support his generalized statements regarding the location of the VE Zone and the potential adverse impacts of the proposed Project due to its location in LSCSF, I accord little or no weight

¹⁷ I also note that ¶ 12 of Mr. Brogna's PFT alleged certain negative impacts of the Applicants' "mechanical, heating and cooling equipment" in the basement of the pre-existing structure on the Property as detrimental to the MWPA interest of "pollution prevention" that the Department purportedly failed to address through the SOC. As correctly stated by the Applicants' witness, Mr. O'Connell, this SOC appeal pertains only to the proposed Project's activities, not pre-existing structures, and therefore, Mr. Brogna's testimony on this issue is irrelevant as well. See Mr. O'Connell's PFT, ¶¶ 56-58.

to Mr. Brogna's testimony, and therefore the Petitioners have failed to sustain their burden of proof on this issue. In reaching this conclusion, I also credit the testimony of Applicants' witnesses, Mr. O'Connell and Mr. Riley, rebutting Mr. Brogna on the LSCSF issue on a point-by-point basis. Mr. Riley's PFT, ¶¶ 17-34; Mr. O'Connell's PFT, ¶¶ 48-49, 53, 59-65.

In stark contrast to Mr. Brogna's vague, generalized testimony, both the Applicants' and the Department's respective witnesses provided detailed testimony that fully analyzed and explained why the proposed Project activities in this LSCSF location will not negatively impact the MWPA interests of flood control and storm damage prevention. As described by the Applicants' witness, Mr. O'Connell, the LSCSF on this Property consists of two Flood Zones, as depicted on the Site Plan: an AE Zone (el. 11') and a VE Zone (el. 13'). Mr. O'Connell's PFT, ¶ 42; See Applicants' App. A. Mr. O'Connell testified that AE Zones are designated by FEMA as areas subject to the 1% annual chance flood with the Base Flood Elevation printed on the Flood Insurance Rate Map and are generally areas of stillwater flooding. Mr. O'Connell's PFT, ¶ 43. He also testified that some AE Zones immediately landward of Velocity Zones (but not all) can have narrow Areas of Moderate Wave Action, which as discussed above, are defined as having wave heights between 1.5 feet and 3 feet, and/or can have Areas of Minimal Wave Action, which as also discussed above, are defined as having wave heights of less than 1.5 feet. Id. However, as AE Zones move further landward, the lower wave heights diminish into areas of stillwater flooding. Id.

Mr. O'Connell also testified that, during a 100 year coastal storm event within the AE Zone, there is primarily stillwater flooding, and movement of flood water is minimal. Mr. O'Connell's PFT, ¶ 44. He further testified that, while AE Zones which are also designated by FEMA as Areas of Moderate Wave Action or Areas of Minimal Wave Action have the potential

for moderate and/or minimal wave action, none of the proposed Project area has been designated as either Areas of Moderate Wave Action or Areas of Minimal Wave Action, thereby indicating that there will be minimal movement of flood waters in the location of proposed Project activities. Mr. O'Connell's PFT, ¶¶ 44, 47.¹⁸

Based upon the minimal movement of flood waters in the AE Zone, Mr. O'Connell testified that the existing topographic contours on the Applicants' Property will be maintained during the proposed Project activities, and any still flood waters that rise during a 100 year storm event will follow the same path as they currently follow on site. Mr. O'Connell's PFT, ¶ 53. In addition, Mr. O'Connell noted that the topography on the Property slopes to the west and southwest, away from the Petitioners' property-- further indicating that impacts from the proposed Project will be remote. Id.

Lastly, Mr. O'Connell testified that the major source of floodwater during a 100 year storm event at the Property is the non-restricted, 'tidally influenced' water body of Lewis Bay. Mr. O'Connell's PFT, ¶ 54. He testified that, in contrast to inland situations, where development can displace flood waters onto adjacent properties, construction on the Petitioners' coastal property, where the flood waters are not so confined, will not increase the flow of flood water onto either the Applicants' Property, or the Petitioners' property, to any measurable degree. Mr. O'Connell's PFT, ¶¶ 54-55. For all of these reasons, Mr. O'Connell opined that the proposed Project at this LSCSF location will not adversely affect the MWPA interests of flood control and storm damage prevention. Mr. O'Connell's PFT, ¶ 66.

The Department's witness, Mr. DeCesare, concurred with the Applicants' position that the

¹⁸ While there is also a VE Zone on the Property, it is undisputed as a result of the unrefuted testimony of the Applicants' and the Department's respective witnesses that the proposed Project is not located in this Zone, and therefore the VE Zone is not pertinent to the LSCSF analysis. See Mr. O'Connell's PFT, ¶¶ 45-46; Mr. DeCesare's PFT, ¶ 28; Project Description at pp. 5-8 above.

proposed Project in this LSCSF location will not adversely impact the MWPA interests of flood control and storm damage prevention for similar reasons. As Mr. DeCesare testified, the proposed Project is located only within the FEMA AE Zone (and is landward of the high energy VE Zone), and therefore expected flooding is considered stillwater flooding, with minimal wave action. Mr. DeCesare's PFT, ¶ 28. As a result, during a severe storm, the Property and all other properties with similar elevations would be inundated equally up to the elevation of the flood event. Id. Hence, the Petitioners' property (which is at the same or slightly higher elevation) will experience the same flooding regardless of any proposed Project activities on the Applicants' Property. Id. Mr. DeCesare also testified that the Department's SOC approving the proposed Project had been conditioned to ensure that all site grading from the Project does not increase runoff onto other properties (including, but not limited to, Petitioners' property), to protect these adjacent properties from flooding or storm damage as a result of Project activities. Mr. DeCesare's PFT, ¶ 29. For these reasons, Mr. DeCesare opined that the proposed Project at this LSCSF location will not negatively impact the MWPA interests of flood control and storm damage prevention. Mr. DeCesare's PFT, ¶ 30.

On a final note, I have reviewed the Hearing Transcript, particularly with respect to the Petitioners' cross-examination of the Applicants' and the Department's witnesses on the issue of LSCSF, as well as the Parties' Closing Briefs. Based upon this review, I find that there is nothing in the record that undercuts or diminishes the credibility of either the Applicants' or the Department's witnesses regarding the LSCSF issue, notwithstanding the Petitioners' attempts to mischaracterize the testimony of these witnesses at the Hearing and in their subsequent Closing Brief. Therefore, based upon the reasons set forth above, I find that with respect to the LSCSF issue that: (1) the Petitioners failed to prove that the proposed Project will negatively impact the

MWPA interests of flood control and storm damage protection; and (2) based upon the testimony of the Applicants' and the Department's respective witnesses, the Department properly determined that the proposed Project will not negatively impact these MWPA interests.

III. THE DEPARTMENT PROPERLY DETERMINED THAT THE PROPOSED PROJECT WILL NOT HAVE A DETRIMENTAL IMPACT ON WILDLIFE HABITAT.

As noted above at pp. 12-13, the MWPA defines "wildlife habitat" as "those areas subject to [the MWPA] which, due to their plant community composition and structure, hydrologic regime or other characteristics, provide important food, shelter, migratory or overwintering areas, or breeding areas for wildlife." 310 CMR 10.04 (definition of "wildlife habitat"). At the Hearing, through their witness, Ms. Boretos, the Petitioners asserted that the proposed Project will negatively impact the MWPA interest of wildlife habitat. In response, Ms. Hamlyn and Mr. DeCesare testified on behalf of the Applicants and the Department respectively, that the proposed Project will not negatively impact wildlife habitat. Based upon my review of the testimony of these three witnesses, I find that, for the reasons detailed below that: (1) the Petitioners failed to prove that the proposed Project will have a detrimental impact on wildlife habitat because their witness, Ms. Boretos, offered no probative testimony on the issue; and (2) both Ms. Hamlyn and Mr. DeCesare presented ample testimony demonstrating that the proposed Project activities will not negatively impact, and/or will actually enhance, wildlife habitat on the Property.

With respect to the Petitioners' claim that the proposed Project will negatively impact wildlife habitat, Ms. Boretos testified that the seaward portion of the Property provides significant overwintering roosting habitat for mallards, gulls, and Canada geese, and that she personally observed scat for all these species along the seaward portion of the Property. Ms.

Boretos' PFT, ¶ 10. She also testified that the on-site wildlife habitat characteristics are juxtaposed to adjacent intertidal feeding area and some vegetative cover providing shelter. Ms. Boretos' PFT, ¶ 11. Ms. Boretos also testified that during high tides, some types of waterfowl need nearby dry areas to rest, digest food and preen their feathers; however, she did not specify the relationship between these "nearby dry areas" and the wildlife habitat on the Property. Ms. Boretos' PFT, ¶ 12. Lastly, Ms. Boretos testified that the SOC failed to protect wildlife habitat because the proposed Project would alter the overwintering roosting habitat of the birds by replacing the area with mowed-lawn grass, thereby destroying the roosting habitat. Ms. Boretos PFT, ¶ 13.

The primary flaw in Ms. Boretos' testimony is that her focus is upon wildlife habitat found in the seaward area of the Property, where no proposed Project activities are planned by the Applicants. As noted by the Applicants through their witness, Ms. Hamlyn, all proposed Project construction activities will take place in the landward portion of the Property, and therefore the Project will not adversely affect any wildlife habitat that currently exists along the seaward side. Ms. Hamlyn's PFT, ¶ 43. In addition, and as the Applicants correctly pointed out, Ms. Boretos failed to specify whether any waterfowl actually utilize the Property to "rest, digest food, and preen their feathers," or use "nearby dry spots" for these activities. See Ms. Hamlyn's PFT, ¶ 46. In that respect, I agree with the Applicants that Ms. Boretos' testimony is speculative in nature. Id. I also agree with the Applicants that the proposed Project's addition of 1,692 square feet of naturalized and undisturbed area close to the shoreline will, in all likelihood, enhance the wildlife habitat interests for birds in this location. Ms. Hamlyn's PFT, ¶¶ 44, 47; See also Proposed Project description at pp. 5-8 above (creation of naturalized area to mitigate

for equivalent increase of Project hardscape).

I am also persuaded that the proposed Project will not have a negative impact on wildlife habitat based on the testimony of the Department's witness, Mr. DeCesare. Mr. DeCesare testified that the MWPA does not presume either LSCSF or Coastal Banks to be significant to the protection of wildlife habitat, and the proposed Project does not exceed any threshold that would trigger the regulatory requirement to perform a wildlife habitat evaluation pursuant to 310 CMR 10.60. Mr. DeCesare's PFT, ¶ 32; See 310 CMR 10.30(1) (Preamble: Coastal Banks are likely to be significant to storm damage prevention and flood control). Mr. DeCesare also testified that under the Wetlands Regulations, the mere presence of wildlife in a wetlands resource area is not enough to establish wildlife habitat value; rather a site's wetlands resource areas must present specific physical habitat characteristics that are necessary for a certain species to breed, seek shelter, migrate or overwinter. Mr. DeCesare's PFT, ¶ 33. With respect to the proposed Project, Mr. DeCesare testified that there must be a "nexus" between the Property's physical resource area characteristics (i.e., the resource areas of Coastal Bank and LSCSF), and the significant wildlife habitat values that depend upon the area(s). Mr. DeCesare's PFT, ¶ 34. Based upon this analysis, Mr. DeCesare concluded that there is no evidence to show that the proposed Project area will provide important food, shelter, migratory or overwintering, or breeding areas for these bird species, i.e., the ducks, geese and gulls are not dependent upon LSCSF or Coastal Bank in this area for important wildlife functions. Mr. DeCesare's PFT, ¶ 36.

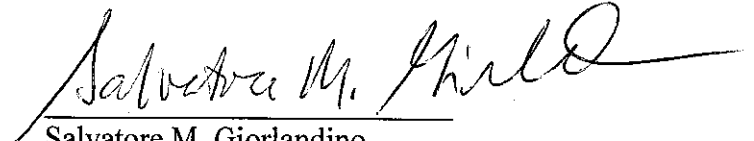
In sum, I find that the Department properly determined that the proposed Project will not have a detrimental impact on wildlife habitat.

CONCLUSION

For the reasons set forth above, I recommend that the Department's Commissioner issue

a Final Decision affirming the Department's SOC approving the Applicants' proposed Project because the Department properly determined that: (1) the Project meets the Performance Standards for work in Coastal Bank as set forth in 310 CMR 10.30(6); (2) the Project will not interfere with the MWPA interests of flood control and storm damage prevention, and as such, the Project will not be detrimental to LSCSF; and (3) the Project will not be detrimental to wildlife habitat.

Date: 05/08/18


Salvatore M. Giorlandino
Chief Presiding Officer

NOTICE-RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

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